

Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

BOMBARDIER INC.,

Plaintiff,

v.

mitsubishi aircraft corporation,
mitsubishi aircraft corporation
america inc., aerospace testing
engineering & certification inc.,
michel korwin-szymanowski,
laurus basson, marc-antoine
delarche, cindy dorn  val, keith
ayre, and john and/or jane does 1-
88,

Defendants.

No. 2:18-cv-01543-JLR

BOMBARDIER INC.'S
RESPONSE TO DEFENDANTS
KEITH AYRE AND MARC-
ANTOINE DELARCHE'S
SURREPLY MOTION TO STRIKE

Bombardier appreciates the opportunity to respond to the Surreply Motion to Strike filed by Defendants Keith Ayre and Marc-Antoine Delarche (collectively, “Defendants”; Dkt. # 213). Defendants base their motion on two arguments: (1) Bombardier improperly introduced “new” evidence in its reply, and (2) Bombardier filed redacted copies of certain exhibits. Neither of these arguments holds up. Specifically, the evidence Defendants complain about is permitted under the Rules of this Court, and the filing of some exhibits in redacted form was unavoidable because Defendants refused to even temporarily and conditionally be bound by the Protective Order of record in this case. (Dkt. # 109.)

I. BOMBARDIER DID NOT INCLUDE “NEW” EVIDENCE IN ITS REPLY

Defendants argue that no evidence can be introduced first on reply. This argument is wrong. If it were correct, replies would be turned into nothing more than vehicles to recycle the arguments of the opening brief and would be of little help to the Court. Defendants’ position is contrary to the Local Rules, which expressly provide: “[t]he moving party may . . . file . . . a reply brief in support of the motion, together with any supporting material of the type described in subsection (1).” LCR 7(b)(3).¹ This Court has specifically recognized that “[a]dditional evidence can be presented in support of a reply brief where ‘[t]he Reply Brief addressed the same set of facts supplied in [respondent’s] opposition to the motion but provides the full context to [respondent’s] recitation of the facts.’ In other words, ‘[e]vidence submitted in direct response to evidence raised in the opposition is not “new.”’” *Kische USA LLC v. Simsek*, No. C16-0168JLR, 2018 WL 620493, at *3 (W.D. Wash. Jan. 29, 2018) (alterations in original) (citations omitted).

The evidence attached to Bombardier’s reply fits within this allowable scope:

- *Whitaker Decl.*: The declaration addresses why Defendants were served with redacted documents and rebuts contentions in the opposition (Dkt. # 159) at p. 12, n.4. The correspondence described in the declaration occurred over a month before Defendants’

¹ The referenced “supporting material...described in subsection (1)” includes “affidavits, declarations, photographic or other evidence.”

1 opposition. Defendants nevertheless chose to raise a “redacted exhibit” issue in a vacuum.
 2 The Whitaker Declaration, responsive to Defendants’ arguments, is permissible.

3 • *Meislitzer Decl.*: The declaration provides context regarding Ayre’s exit meeting, and
 4 rebuts the assertion that Ayre discussed FIDEX issues at that meeting, an issue raised in the
 5 opposition at p. 8, ll. 6-8, and p. 16, l. 27 - p. 17, l. 2.

6 • *Danley Decl., Exhibit E*: The exhibit provides context regarding the copying and retention
 7 of a 2013 email from David Johns (opposition at p. 5, l. 20 - p. 6, l. 2); Defendants admit that
 8 the exhibit “arguably” rebuts facts in the opposition. (Surreply at p. 2, ll. 12-14.)

9 • *Danley Decl., Exhibits F, H, K, L*: These exhibits provide context with respect to the
 10 number of Bombardier emails Ayre sent to himself and they rebut assertions at p. 6, l. 25 -
 11 p. 7, l. 2 of Defendants’ Opposition.

12 • *Danley Decl., Exhibit B*: This exhibit provides context regarding a web site identified by
 13 Ayre and rebuts the assertion that the Bombardier trade secret material is available at this web
 14 site (allegation raised at Opp’n p. 5, ll. 15-19, and Ayre’s declaration ¶ 28, Dkt. # 160).

15 • *Danley Decl., Exhibit C*: This exhibit provides context relating to a “Frederic email” (First
 16 Amended Complaint ¶ 79, Dkt. # 143) and rebuts Defendants’ “Frederic email” statements at
 17 p. 7, ll. 11-15, and p. 18, ll. 11-17 of the opposition.

18 • *Danley Decl., Exhibit D*: This exhibit provides context for and rebuts the statement that
 19 Bombardier’s counsel disclosed the Frederic email with “every indication that Bombardier
 20 believed the email *not* to contain its trade secrets.” (Opp’n at p. 20, l. 27 - p. 21, l. 2.)

21 • *Danley Decl., Exhibit I, J*: These exhibits provide context regarding Defendants’ normal
 22 treatment of work related emails, and rebut Defendants’ statements that emailing work related
 23 material to personal email accounts was a common practice, at least as it pertains to
 24 Defendants. (*See id.* at p. 17, ll. 17-20.)

25 • *Borfitz Decl.*: This declaration provides context regarding the connection between the
 26 trade secrets taken by Ayre and his job responsibilities at MITAC, and it rebuts assertions that
 27 he (i) took the FIDEX emails to prepare for his exit interview and (ii) took the Transport

1 Canada email as a non-work related reminder (*see id.* at p. 16, ll. 5-8, and p. 16, l. 26, - p. 17,
 2 l. 2). The conclusions in Mr. Borfitz's Declaration show that it is much more likely that Ayre
 3 took these trade secrets for work on the MRJ.

4 Defendants note that Danley Exhibits A and G were previously part of the record.
 5 While they may have been in redacted form, and/or otherwise lacking appropriate
 6 confidentiality designations, Bombardier re-filed them under seal and properly designated, as
 7 part of its reply to make a clean record. Regardless, other than arguing that these exhibits are
 8 already part of the record, it is unclear on what basis Defendants seek to strike them.

9 **II. DEFENDANTS REFUSED TO ABIDE BY THE PROTECTIVE ORDER AND NOW COMPLAIN**
 10 **THAT THEY ARE NOT RECEIVING DOCUMENTS FILED UNDER SEAL**

11 Throughout their Surreply, Defendants argue that certain exhibits should be struck
 12 because they are redacted. This is a problem of Defendants' own making because Defendants'
 13 counsel have repeatedly declined to be bound by the protective order. This stance by
 14 Defendants strikes at the heart of Bombardier's trade secret claims, which require that
 15 Bombardier take reasonable steps to protect its trade secrets. Forwarding the trade secret
 16 information to Defendants' counsel, who had consistently maintained that they were not
 17 bound by the protective order, could undercut Bombardier's entire case.

18 Bombardier made proposals to Defendants' counsel to address this issue, as described
 19 in the Whitaker Declaration. (Dkt. # 193.) Bombardier even offered to serve the sealed
 20 versions on Defendants' counsel as long as they agreed to honor the current protective order
 21 on at least an interim basis. Defendants rejected this proposal, silently sat for two months
 22 without approaching the Court, and only within the last week finally agreed to honor the
 23 protective order while the parties discuss potential modifications. Defendants' complaints
 24 about redacted copies ring hollow given their actions.

25 **CONCLUSION**

26 Bombardier respectfully submits it acted reasonably in filing the exhibits to its Reply.
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1 Dated this 3rd day of June, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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